

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

JAN 25 2008

COURT OF APPEALS
DIVISION TWO

JAMES T. RICHARDSON, JR.,)	
)	
Petitioner Employee,)	2 CA-IC 2006-0024
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
THE INDUSTRIAL COMMISSION OF)	Not for Publication
ARIZONA,)	Rule 28, Rules of Civil
)	Appellate Procedure
Respondent,)	
)	
RINGLER PLUMBING, INC.,)	
)	
Respondent Employer,)	
)	
STATE COMPENSATION FUND,)	
)	
Respondent Insurer.)	
)	

SPECIAL ACTION - INDUSTRIAL COMMISSION

ICA Claim No. 0000P168865

Insurer No. 8754016

LuAnn Haley, Administrative Law Judge

AWARD AFFIRMED

James T. Richardson, Jr.

Bisbee
In Propria Persona

The Industrial Commission of Arizona
By Laura L. McGrory

Phoenix
Attorney for Respondent

State Compensation Fund
By Bill H. Enriquez

Tucson
Attorneys for Respondents
Employer and Insurer

B R A M M E R, Judge.

¶1 In this statutory special action, petitioner James Richardson, Jr. contends the administrative law judge (ALJ) erred in determining Richardson’s neck condition did not warrant reopening his workers’ compensation claim. We affirm the award.

Factual and Procedural Background

¶2 “On review of an Industrial Commission award, we must view the evidence in the light most favorable to sustaining the Industrial Commission’s findings and award.” *Roberts v. Indus. Comm’n*, 162 Ariz. 108, 110, 781 P.2d 586, 588 (1989). In 1987, Richardson suffered an industrial injury to his left wrist and shoulder. His claim was closed with a permanent, unscheduled impairment in 1990. His 1993 petition for rearrangement was denied, as was his 1993 petition to reopen. Richardson’s workers’ compensation carrier, State Compensation Fund of Arizona (SCF), awarded Richardson supportive care in 1996, providing three office visits per year, massage therapy, and medication.

¶3 Richardson filed a petition to reopen his workers' compensation claim in January 2003, asserting he had developed "moderate to severe central stenosis with some cord indentation." SCF denied that petition, and Richardson did not seek review. He again petitioned to reopen his claim in December 2003, asserting that his condition had worsened and he suffered from depression and sleep problems because of his 1987 industrial injury. SCF denied that petition and, again, Richardson did not seek review.

¶4 SCF terminated its 1996 supportive care award in 2003, after the results of an independent medical evaluation suggested Richardson no longer required supportive care. Richardson then requested a hearing and, pursuant to A.R.S. § 23-1061(J), asked that supportive care be continued, including treatment for his depression and sleep problems. In 2004, the ALJ granted Richardson additional supportive care for his "neck and arm condition" but denied supportive care for depression and sleep problems, stating that Richardson's psychological condition was not stationary and that he needed to file a petition to reopen his claim to receive benefits for that condition.

¶5 Richardson filed a petition to reopen in 2005, apparently requesting "treatment [by] a pain psychologist, physiotherapy, and neck surgery." After SCF denied that petition, Richardson then sought a hearing to review that decision. At the hearing, Richardson's doctor, Bennet Davis, testified that there were "progressive changes over the years in [Richardson's] neck that have led to a narrowing of the cervical spine" that could be surgically corrected. He also opined that those changes were a result of the industrial injury to Richardson's left arm.

¶6 Before the hearing, several physicians had examined Richardson and submitted a group consultation report containing their findings. Richardson agreed at his hearing that the ALJ could consider that report without his having an opportunity to cross-examine those doctors. Although SCF initially requested an additional hearing to have one of the doctors testify, it later withdrew that request. The submitted report stated the examining doctors had found “no objective clinical findings” of any change in Richardson’s physical condition since 1995 and concluded there was no “new, additional, or previously undiscovered condition causally related to the industrial injury of 10/23/87.” The examining doctors did not recommend surgery on Richardson’s cervical spine, noting that “[t]he most recent cervical spine imaging study is said by the interpreting radiologist to reveal only mild findings.” The doctors also stated Richardson could benefit from psychological treatment for his “depression or depressed mood related to pain,” although they concluded it was unclear whether Richardson’s psychological condition was caused by the industrial accident or by a 2001 motor vehicle accident.

¶7 The ALJ denied the petition to reopen. She adopted the opinions of the group evaluators “[r]egarding the issue of reopening [Richardson’s] claim for active care for his cervical condition,” stating the claim “should not be reopened for cervical surgery.” However, she awarded additional supportive care including “monthly office visits, physical therapy, medications, and . . . injections,” as well as “treatment by a psychiatrist.” The ALJ affirmed her decision upon review, and this statutory special action followed.

Discussion

¶8 “We will not set aside the award if it is based upon any reasonable interpretation of the evidence.” *Roberts*, 162 Ariz. at 110, 781 P.2d at 588. But we “review all questions of law de novo.” *Benafield v. Indus. Comm’n*, 193 Ariz. 531, ¶ 11, 975 P.2d 121, 125 (App. 1998). “The claimant seeking to reopen under A.R.S. § 23-1061(H) has the burden of showing the presence of one of the three statutory factors: new, additional or previously undiscovered condition.” *Stainless Steel Specialty Mfg. Co. v. Indus. Comm’n*, 144 Ariz. 12, 16, 695 P.2d 261, 265 (1985) (emphasis omitted). And the claimant must show a “causal connection with the industrial injury.” *Id.* at 19, 695 P.2d at 268.

¶9 Richardson first asserts the ALJ erred by denying his petition to reopen his claim to permit neck surgery because “he has been receiving what constitutes active care” for his industrial injury “since 2002.” Active care is defined as “treatment for a non-stationary condition which will improve that condition.” *Tarpy v. Indus. Comm’n*, 138 Ariz. 395, 397 n.1, 675 P.2d 282, 284 n.1 (App. 1983). In contrast, supportive care is care “intended to maintain [a] ‘relatively stable status,’ rather than to improve the employee’s physical condition,” once an injury has become stationary. *Continental Cas. Co. v. Indus. Comm’n*, 23 Ariz. App. 294, 296, 532 P.2d 869, 871 (1975). As we understand his reasoning, Richardson argues that, because he had been receiving active care instead of supportive care, his condition is not stationary, and, therefore, his petition to reopen should have been granted.

¶10 Whether a petitioner has been awarded active or supportive care in the past, however, is not material to whether his or her claim should be reopened. *Cf. Wyckoff v. Indus. Comm’n*, 169 Ariz. 430, 435, 819 P.2d 1016, 1021 (App. 1991) (determination whether condition requires active care “immaterial to the right to reopen” claim); *see also Sneed v. Indus. Comm’n*, 124 Ariz. 357, 359, 604 P.2d 621, 623 (1979) (“Petitioner need not show he is in need of active treatment in order to reopen his claim. He need only show the existence of a new, additional or previously undiscovered condition.”). The distinction between active and supportive care is instead relevant to whether a condition is stationary and, therefore, whether temporary disability benefits should be terminated and permanent disability benefits awarded under A.R.S. § 23-1044(F). *See Employers Mut. Liab. Ins. Co. of Wis. v. Contreras*, 109 Ariz. 383, 386, 509 P.2d 1030, 1033 (1973) (“[W]hen the employee’s condition becomes stationary, no more partial temporary disability benefits may be paid; instead, it becomes the duty of the Commission to determine the extent of the permanent residual disability, if any.”); *Johnson-Manley Lumber v. Indus. Comm’n*, 159 Ariz. 10, 13, 764 P.2d 745, 748 (App. 1988) (need for active medical treatment establishes condition not stationary). Richardson’s claim was closed with a permanent impairment in 1990. No matter how he wishes to classify the treatment he has received since then, he must still show a new, additional, or previously undiscovered condition, caused by the industrial accident, to reopen his claim. *See* A.R.S. § 23-1061(H); *Stainless Steel*, 144 Ariz. at 16, 19, 695 P.2d at 265, 268.

¶11 Richardson next contends the ALJ erred by determining he had not demonstrated his neck condition was a new, additional, or previously undiscovered condition caused by his industrial accident. *See* § 23-1061(H); *Stainless Steel*, 144 Ariz. at 16, 19, 695 P.2d at 265, 268. The ALJ stated that she had adopted the opinions presented in the group evaluation and that the claim “should not be reopened” for surgery. As we noted above, the group evaluation concluded that there were no objective physical findings suggesting a change in Richardson’s condition and that cervical surgery was not warranted in any event.

¶12 The ALJ, however, did not specify whether her decision was based on a determination that Richardson had failed to prove his neck condition was a new, additional, or previously undiscovered condition caused by his 1987 industrial accident or on a determination that cervical surgery was unnecessary.¹ Either conclusion, however, is supported by the record. Although there was a material conflict in the evidence between Davis’s testimony and the group’s evaluation concerning these issues, it was the ALJ’s duty to resolve those conflicts, and we have no valid basis to disturb her decision. *See Noble v. Indus. Comm’n*, 140 Ariz. 571, 575, 683 P.2d 1173, 1177 (App. 1984) (“The [ALJ] resolves

¹The ALJ stated Richardson’s claim “was closed on August 18, 1995 and therefore the comparison date for [his] Petition to Reopen is his condition in August of 1995 as compared to March of 2006.” That conclusion was incorrect. Richardson’s last petition to reopen was filed in December 2003. To support reopening his claim, Richardson had to demonstrate either that a new or additional condition had arisen after the date that petition was filed or that a previously undiscovered condition had been discovered after that date. *See Phoenix Cotton Pickery v. Indus. Comm’n*, 120 Ariz. 137, 139, 584 P.2d 601, 603 (App. 1978) (final decision denying petition to reopen becomes “a binding determination that petitioner’s physical condition had not changed so as to justify a reopening as of [the date of that petition]”).

conflicts in medical evidence, and h[er] resolution will not be disturbed unless it is wholly unreasonable.”).

¶13 Richardson also contends that “[a] change in medical recommendation,” in his case, “from conservative treatments . . . to surgery” is sufficient to support reopening his claim. He relies on *Stainless Steel*, in which our supreme court stated that “reopening is permissible when a change in physical circumstances or medical evaluation creates a need for treatment, and the legitimacy of that need was not and could not have been adjudicated at the time of the last award.” 144 Ariz. at 18-19, 695 P.2d at 267-68. As noted above, however, the group consultation report stated the examining doctors did not recommend surgery on Richardson’s cervical spine. Again, it was the ALJ’s role to resolve the conflict between that recommendation and Davis’s opinion that surgery was warranted. *See Noble*, 140 Ariz. at 575, 683 P.2d at 1177.

¶14 Additionally, Richardson identifies nothing in the record suggesting that the possibility of neck surgery “was not and could not have been adjudicated” when his previous petition to reopen was denied in 2003. *Stainless Steel*, 144 Ariz. at 19, 695 P.2d at 268; *see also Phoenix Cotton Pickery v. Indus. Comm’n*, 120 Ariz. 137, 139, 584 P.2d 601, 603 (App. 1978) (final decision denying petition to reopen becomes “a binding determination that petitioner’s physical condition had not changed so as to justify a reopening as of [the date of that petition]”).

¶15 Last, Richardson contends the ALJ “incorrectly based” her decision upon review “on medical reports that did not address [his] cervical injury but [instead] addressed

[his] lower back problems.” In that decision, the ALJ noted that one of Richardson’s own doctors, Stephen Hanks, had stated in a report dated June 20, 2006, that he did not recommend surgery. We agree with Richardson that Hanks’s report clearly referred only to Richardson’s lower back condition, which Richardson acknowledges is not related to his industrial accident. Indeed, in other reports, Hanks recommended cervical surgery. That does not mean, however, that we must set aside the award. The ALJ’s decision upon review also affirmed her earlier findings, which, as we have explained, fully support her decision upon hearing. Nothing in the ALJ’s review suggests she would have changed that decision if not for Hanks’s report.

¶16 For the reasons stated above, we affirm the award.²

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge

²We note that the ALJ’s award of supportive care for Richardson’s psychological condition appears inconsistent with the previous ALJ’s 2004 decision granting Richardson supportive care for his physical condition but determining that his psychological condition required active care and that Richardson should therefore file a petition to reopen to receive psychological treatment. Because Richardson only argues the ALJ should have reopened his claim for neck surgery and does not argue we should set aside the award of supportive care, we do not address this issue.